(2)

No. 91-298

In the Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH J. ROSA, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

GERALD L. JACOBS
General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

ROBERT D. MCGILLICUDDY
Deputy Senior Counsel

P. MATTHEW SUTKO
Senior Attorney

CHRISTOPHER J. BELLOTTO
Counsel
Resolution Trust Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

Subparagraph (i) of 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989) requires exhaustion of an administrative claims procedure with respect to "any claim * * * for payment from * * * the assets of any depository institution for which the [Resolution Trust] Corporation has been appointed receiver." Subparagraph (ii) requires exhaustion with respect to "any claim relating to any act or omission of such institution or the [Resolution Trust] Corporation as receiver."

1. Does Section 1821(d)(13)(D) apply to claims arising after the Resolution Trust Corporation (RTC) was appointed receiver if those claims seek payment out of the assets of the institution for which the RTC was appointed receiver?

2. If Section 1821(d)(13)(D) requires exhaustion, did the court of appeals err in declining to fashion a judicial exception to the statutory exhaustion requirement?

3. If Section 1821(d)(13)(D) requires exhaustion, does the statute violate Article III or the Due Process Clause?

4. Does an injunction requiring the RTC as receiver of a failed institution to take specific actions that will deplete the assets of the failed institution violate 12 U.S.C. 1821(j) (Supp. I 1989), which prohibits injunctions that "restrain or affect the exercise of powers or functions of the [RTC] as * * * receiver"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution, statutes and regulation:

Statutes and regulation—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-298

KENNETH J. ROSA, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22-59) is reported at 938 F.2d 383. The opinion of the district court (Pet. App. 1-21) is reported at 752 F. Supp. 1231.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1991. Pet. App. 23. The petition for a writ of certiorari was filed on August 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1985, City Federal Savings Bank (City Savings I) adopted an employee pension plan, which was subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Under the terms of the Plan, the Board of Directors of City Savings I "reserve[d] the right at any time to amend, suspend or terminate the Plan . . . for any reason and without the consent of any . . . Participant [or] Beneficiary." Pet. App. 26, 52.

On December 7, 1989, the Office of Thrift Supervision (OTS) declared City Savings I insolvent and appointed the RTC to act as its receiver. On the same day, the OTS chartered a separate institution, City Savings Bank, F.S.B. (City Savings II), and appointed the RTC to act as its conservator. The next day, City Savings II purchased certain assets and assumed certain liabilities of City Savings I pursuant to a Purchase and Assumption Agreement between City Savings II and the RTC as receiver for City Savings I. Some time later, the RTC as conservator of City Savings II formally assumed the pension plan, executing amendments to that effect and notifying the Pension Benefit Guaranty Corporation (PBGC).[1] Pet. App. 3, 26-27.

The RTC determined in the summer of 1990 that the plan would cause material financial damage to City Savings II and that the decision to assume the plan accordingly violated applicable regulations.[2]

---

[1] The PBGC is a wholly owned United States government corporation that administers various aspects of Title IV of ERISA relating to the termination of pension plans. See generally *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2671-2672 (1990).

[2] See 12 C.F.R. 563.47(a) (1991) ("No savings association * * * shall sponsor an employee pension plan which, because

Consequently, on July 19, 1990, the RTC as conservator for City Savings II revoked the earlier assumption of the pension plan and returned the pension plan to City Savings I, for which the RTC was still receiver. On July 19, 1990, the RTC as receiver for City Savings I distributed a notice of termination to the participants and beneficiaries of the plan.[3] On September 19, 1990, pursuant to the right to terminate reserved in the plan, the RTC as receiver for City Savings I sent the PBGC formal notice of its intention to terminate the plan. Pet. App. 28-29.

Faced with continued deterioration in the value of the assets of City Savings II, the OTS on September 21, 1990 declared City Savings II insolvent, appointed the RTC as its receiver, and created a separate institution, City Savings, F.S.B. (City Savings III), for which the RTC was appointed conservator. That same day, pursuant to a Purchase and Assumption Agreement, the RTC as receiver for City Savings II transferred certain assets and liabilities to City Savings III. Pet. App. 29-30.

2. Petitioners commenced this lawsuit as a class action in the United States District Court for the District of New Jersey on November 6, 1990, seeking declaratory relief that City Savings II, City Savings III, and the RTC (in its corporate capacity, as

---

of unreasonable costs or any other reason, could lead to material financial loss or damage to the sponsor.").

[3] Although the RTC as conservator of City Savings II had assumed the plan effective as of December 8, 1989, and had made the contributions to the plan required in January and April of 1990, the termination notice stated that benefits had ceased accruing as of December 7, 1989, and that the anticipated date of termination was September 20, 1990. Pet. App. 27-29.

receiver for City Savings I and City Savings II, and as conservator for City Savings III) had acted wrongfully in terminating the pension plan, injunctive relief barring retroactive termination of the plan, and an order compelling payment of all due and future plan contributions. The district court granted a preliminary injunction against City Savings II, City Savings III, and the RTC (in its various capacities), which barred any action to terminate the plan and ordered payment of all required contributions. Pet. App. 1-21.

3. The court of appeals unanimously reversed, in a detailed opinion by Judge Seitz, generally concluding that monetary claims against the two failed institutions were barred by 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989),[4] because petitioners had not first presented those claims to the RTC as receiver, and that injunctive relief against the RTC as receiver and conservator were barred by 12 U.S.C. 1821(j)

---

[4] Section 1821(d)(13)(D) provides:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

Pursuant to Section 1811, references to "the Corporation" in Chapter 16 of Title 12 generally refer to the Federal Deposit Insurance Corporation, but pursuant to 12 U.S.C. 1441a(b)(4) (Supp. I 1989), the RTC has the same powers as 12 U.S.C. 1821, 1822, and 1823 (Supp. I 1989) grant to the FDIC. See Pet. App. 33 n.10.

(Supp. I 1989),[5] because the relief would affect the RTC's exercise of its authority as receiver. Pet. App. 22-59.

a. Petitioners contended that Section 1821(d)(13)(D) requires exhaustion only with respect to claims that arise before the institution fails; accordingly, because petitioners' claims against those institutions arose out of actions taken after the RTC was appointed receiver for the relevant institutions, petitioners contended that they could sue in district court without first submitting their claims to the RTC's administrative claims procedure. With respect to monetary claims against the RTC as receiver of City Savings I and City Savings II, the court of appeals rejected this argument, noting that the language of the statute applies to all claims against "any depository institution for which the [RTC] has been appointed receiver." Because the claims in question were against City Savings I and City Savings II, and because at the time the lawsuit commenced the RTC had been appointed a receiver for both of those institutions, the court of appeals concluded that these claims fell within 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989). Pet. App. 36-37.

b. The court of appeals also rejected petitioners' contention that they should not be required to exhaust the administrative claims process because exhaustion would be futile. The court noted that, whatever position the RTC had taken in the litigation, the receiver

---

[5] 12 U.S.C. 1821(j) (Supp. I 1989) reads:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

nevertheless might choose to allow the claim to avoid future litigation, a decision that would moot the controversy. Pet. App. 44. The court also rejected PBGC's argument that exhaustion should not be required on legal issues arising under ERISA, because the RTC has no particular expertise on such questions. The court explained that "[t]he primary purpose underlying FIRREA's exhaustion scheme is to allow RTC to perform its statutory function of promptly determining claims so as to quickly and efficiently resolve claims against a failed institution without resorting to litigation." Pet. App. 46a. Given this limited purpose, and the limited duration of the administrative claims process, the court concluded that it would be inappropriate to fashion a judicial exception. *Ibid.*

c. The court of appeals also rejected petitioners' argument that it would violate Article III or the Due Process Clause of the Fifth Amendment to require petitioners to exhaust their claims before the RTC. The court noted that petitioners were "not deprived in any way of access to an Article III court, but at most suffer a relatively slight delay to permit a receiver to determine whether to allow their claims." Pet. App. 47. Because the statute provides for *de novo* review by the district court, the court of appeals concluded that there is nothing inappropriate in allowing the RTC to make a preliminary determination. *Id.* at 47-48.

d. The court of appeals also rejected petitioners' contention that the anti-injunction provision set forth in 12 U.S.C. 1821(j) (Supp. I 1989) did not bar the nonmonetary relief granted by the district court because the challenged actions were beyond the scope of the RTC's authority as receiver. The court of appeals first addressed the portion of the injunction

that would require the RTC as conservator of City Savings III to expend assets of that institution to make contributions to the pension plan. The court of appeals believed that a decision not to make monetary payments clearly fell within the scope of the RTC's authority under Section 1821(d)(2)(B)(iv), which authorizes the RTC to "preserve and conserve the assets and property of [the failed] institution." The court then turned to the portion of the injunction that prohibited the RTC as receiver of City Savings I and City Savings II from taking any action to terminate the plan. The court of appeals concluded that this action fell within the scope of the RTC's authority as receiver because City Savings I had a contractual right to terminate the plan, see page 2, *supra*, and because the RTC as receiver succeeded to all contractual rights of City Savings I, see 12 U.S.C. 1821(d)(2)(A)(i) (Supp. I 1989). Pet. App. 51-53.

ARGUMENT

The decision of the court of appeals rests upon the application of explicit provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 83, to the facts of this case and does not conflict with any decision of this Court or another court of appeals.

1. The establishment of the RTC was one of the principal steps taken in FIRREA to redress the savings and loan crisis. See FIRREA Section 501(a), 103 Stat. 369-376, adding 12 U.S.C. 1441a(b) (Supp. I 1989). To give the RTC adequate time to deal with the mass of claims against the failed institutions for which it would become receiver, Congress established a claims procedure. Any person wishing to pursue claims against a failed institution or the RTC as re-

ceiver of such an institution first must present those claims to the RTC to give it an opportunity to resolve the claim without litigation. The statute obligates the RTC to decide to allow or disallow the claims within 180 days. 12 U.S.C. 1821(d)(5)(A)(i) (Supp. I 1989). At the conclusion of the 180-day period (or earlier, if the RTC acts earlier), the claimant may file an action in a federal district court seeking a *de novo* determination of the claim, even if the RTC has not yet made a ruling on its claim. Section 1821(d)(6)(A); see Pet. App. 34 n.11. To give the claims procedure substance, Section 1821(d)(13)(D) divests courts of jurisdiction over claims for payment from the assets of a failed institution for which the RTC has been appointed receiver other than in accordance with the claims procedure. In sum, because all claimants retain a right to seek *de novo* review of their claim in federal court, the sole substantive effect of the claims procedure is to defer decision of the claims for a 180-day period so that the RTC will have a chance to evaluate the claims and forestall unnecessary litigation.[6]

Petitioners contend (Pet. 16-19) that the statutory exhaustion requirement set forth in Section 1821(d)(13)(D) does not apply to their claims because their claims arise out of events that occurred after City Savings I failed. As the court of appeals explained (Pet. App. 36-37), this argument is inconsistent with the

---

[6] The procedures were designed by Congress in response to this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), which held that claimants were not required to exhaust their claims in claim procedures adopted by FSLIC, largely because of the indefinite duration of the FSLIC procedures. See *Coit*, 489 U.S. at 584-586; H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. 1, at 418-419 (1989).

plain language of Section 1821(d)(13)(D)(i), which applies to any claim for payment from the assets of the failed institution. Moreover, this argument is inconsistent with the clear import of Section 1821(d)(13)(D)(ii), which applies to claims "relating to any act or omission of * * * the Corporation as receiver." Because any such claim necessarily would arise out of events that occur after the institution failed, petitioner's argument essentially attempts to read this subsection out of the statute. The court of appeals correctly rejected petitioner's contention.

2. Petitioners next argue (Pet. 19-24) that, even if the statute requires exhaustion, the federal courts should create a judicial exception to the exhaustion requirement. But such judicial exceptions to a statutory exhaustion requirement can be recognized only where necessary to implement congressional intent. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975) (noting that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue"). Here, the court of appeals properly found (Pet. App. 46) that any such exception would defeat the entire purpose of the exhaustion scheme set forth in FIRREA: to enable the RTC to resolve claims in advance of litigation, thus decreasing the litigation burden of the RTC's myriad receiverships and the accompanying expense of resolving these claims.

Petitioners rely heavily (Pet. 19-20) on *Bowen* v. *City of New York*, 476 U.S. 467, 485 (1986), in which this Court excused compliance with a statutory exhaustion requirement in the Social Security Act; petitioners suggest that *Bowen* established a general rule that exhaustion is not required where the agency conduct is inconsistent with governing law.

But this dramatically overreads *Bowen*; a rule waiving exhaustion in any case where the agency decision is incorrect would completely defeat the purpose of the exhaustion requirement. As this Court has explained, *Bowen* was a narrow decision that waived exhaustion to allow the claimants to challenge "a secret, internal policy." *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 123 (1988). In this case as in *Sebben*, the agency action will "not [be] taken pursuant to a secret, internal policy * * *. If [petitioners] wis[h] to challenge it they should [do] so when their cases [are] decided." *Ibid.*

Similarly, petitioners err in relying (Pet. 21-22) on cases in which exhaustion was waived because the remedy sought by the claimant was not available before the agency. As the court of appeals noted, the only claims petitioners were required to exhaust sought monetary relief, which the receiver is authorized to grant. To the extent petitioners' complaint is that the receiver is unlikely to have sufficient funds to satisfy their claims, their predicament is caused not by the claims procedure but by their misfortune in holding claims against a failed depository institution.

In sum, petitioners have advanced no argument that would justify a court in fashioning an exception to the specifically articulated exhaustion requirement set forth in 12 U.S.C. 1821(d)(13)(D) (Supp. I 1989), and cannot suggest that any court has concluded that such an exception would be appropriate. This claim merits no further review.

3. Petitioners also contend (Pet. 24-27) that the statutory exhaustion procedure violates Article III and the Due Process Clause of the Fifth Amendment because it requires them to submit their claim to a biased decisionmaker. As the court of appeals recognized (Pet. App. 46-48), this claim is meritless.

Nothing in the claims procedure need have the slightest effect on any aspect of the judicial disposition of petitioners' claims except the timing, because the RTC's decision to allow or disallow the claim is not entitled to deference from the district court. The Due Process Clause clearly would permit a statute staying all actions against the RTC for a 180-day period. Cf. 12 U.S.C. 1821(d)(12)(A)(ii) (Supp. I 1989) (granting the RTC a statutory right to a 90-day stay in any case pending against an institution for which it becomes a receiver). There is no significant difference between that statute and the provisions of Section 1821(d) that petitioner challenges, which simply provide for a 180-day period during which the RTC has an opportunity to make a nonbinding determination regarding claims against assets under its supervision. See *Coit*, 489 U.S. at 587 (acknowledging that FSLIC might have had an inherent conflict of interest with claimants who were competing creditors, but nevertheless suggesting that claimants could be required to submit their claims to FSLIC for consideration before going to court).

4. Petitioners also contend (Pet. 11-16) that the court of appeals erred in its application of the anti-injunction provisions of Section 1821(j). The court invalidated an injunction that would have required the RTC as receiver of the failed institutions to continue making contributions to the pension plan, and that would have prohibited the RTC from taking any actions to terminate that plan. In particular, petitioners renew their contention that the RTC's actions with respect to the plan are beyond the capacity of the RTC as receiver. For the reasons articulated by the court of appeals (Pet. App. 48-55), this contention is meritless. The injunction would have required the RTC immediately to make specified expenditures from the assets of the failed institutions, and would

have barred it from exercising the contractual right of City Savings I to terminate the pension plan. The RTC's decision not to make those expenditures and instead to terminate its obligations under the plan—an action that in substance placed petitioners on the same footing as other creditors—unquestionably is within the scope of the RTC's authority as a receiver. See 12 U.S.C. 1821(d)(2)(A)(i) and (B)(iv) (Supp. I 1989). Such an injunction clearly would "restrain or affect the exercise of powers or functions of the [RTC] as a * * * receiver." The court of appeals thus correctly determined that the district court erred in issuing the challenged injunction.

Petitioners' basic contention on this point seems to be that ERISA prohibits the type of retroactive plan termination contemplated by the RTC in this case; in their view, Section 1821(j) should not bar an injunction that would prohibit an act that violated federal law. See Pet. 11-12. But such an interpretation would drain Section 1821(j) of force in all but the most insignificant of cases. Federal courts never enter injunctions except in cases where they have determined that the action to be enjoined contravenes established legal principles. The very point of an anti-injunction provision is to prevent courts from enjoining actions, even if those actions violate otherwise operative legal principles.[7] The court of appeals correctly rejected this argument.

---

[7] Compare *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 149 (1988) (noting that the Anti-Injunction Act bars an injunction "even when the interference [with a protected federal right] is unmistakably clear"); *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, 371 (1960); C. Wright, *Law of Federal Courts* § 47, at 281 (4th ed. 1983) (rejecting decisions that held that the Anti-Injunction Act, 28 U.S.C. 2283, does not bar injunctions "necessary to prevent grave and irreparable injury"; explaining that "with or with-

Petitioners err in their contention (Pet. 13-14) that the court of appeals' interpretation of Section 1821(j) is inconsistent with this Court's interpretation of a similar provision in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989). In *Coit*, this Court concluded that identical language in 12 U.S.C. 1464(d)(6)(C) did not divest the federal courts of subject-matter jurisdiction to adjudicate claims, because applicable law had not granted FSLIC the authority to adjudicate the claims of creditors against failed institutions. *Coit*, 489 U.S. at 574-575. *Coit* simply stands for the proposition that Section 1821(j) does not bar an injunction against actions—such as adjudication by FSLIC of the claims of creditors—that by their very nature were beyond the scope of the receivership as constituted by Congress. The *Coit* opinion cannot fairly be read to support petitioners' novel claim that Section 1821(j) permits any injunction that rests on a determination that the challenged action is incorrect under some other federal law; as discussed above, such a reading of Section 1821(j) would drain it of all force. Whatever the merits of petitioners' interpretation of ERISA, the actions involved here—operation of an institution and disposition of its assets—clearly fall within the scope of the power to conduct a receivership Congress bestowed on the RTC in FIRREA. Accordingly, the analysis in *Coit* supports the court of appeals' conclusion that Section 1821(j) bars the injunction at issue here.[8]

---

out § 2283, injunctions cannot issue save to prevent irreparable injury, and there would be no point in the statute if it meant no more than this").

[8] Petitioners also contend (Pet. 14-15) that the decision of the court of appeals conflicts with the decision of the Fifth

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

GERALD L. JACOBS
General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

ROBERT D. MCGILLICUDDY
Deputy Senior Counsel

P. MATTHEW SUTKO
Senior Attorney

CHRISTOPHER J. BELLOTTO
Counsel
Resolution Trust Corporation

NOVEMBER 1991

Circuit in *281-300 Joint Venture* v. *Onion*, 938 F.2d 35 (1991). In that case, the Fifth Circuit noted that the RTC had the power to conduct a foreclosure sale in the course of a clearly correct holding that Section 1821(j) barred an injunction that would have prevented the RTC from conducting a foreclosure sale. *Id.* at 39. Thus, *Onion* is a fact-specific application of the analysis set forth in *Coit*; nothing in the opinion in that case supports petitioners' contention that Section 1821(j) allows an injunction in any case in which the federal court determines that the challenged action is inappropriate.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45144